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BEFORE THE ARIZONA CORPORATION COMMISSION

1
2 ORIGINAL

3
4 IN THE MATTER OF THE APPLICATION
5 OF HUALAPAI VALLEY SOLAR LLC, IN
6 CONFORMANCE WITH THE
7 REQUIREMENTS OF ARIZONA REVISED
8 STATUTES §§ 40-360.03 AND 40-360.06,
9 FOR A CERTIFICATE OF
10 ENVIRONMENTAL COMPATIBILITY
11 AUTHORIZING CONSTRUCTION OF THE
12 HVS PROJECT, A 340 MW PARABOLIC
13 TROUGH CONCENTRATING SOLAR
14 THERMAL GENERATING FACILITY AND
15 AN ASSOCIATED GEN-TIE LINE
16 INTERCONNECTING THE GENERATING
17 FACILITY TO THE EXISTING MEAD-
18 PHOENIX 500kV TRANSMISSION LINE,
19 THE MEAD-LIBERTY 345kV
20 TRANSMISSION LINE OR THE
21 MOENKOPI-EL DORADO 500kV
22 TRANSMISSION LINE.

Docket No.: L-00000NN-09-0541-00151

Case No. 151

APPLICANT'S RESPONSE TO
REQUEST FOR REVIEW

Arizona Corporation Commission
DOCKETED

MAR 10 2010

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23 Hualapai Valley Solar LLC ("Applicant") provides this Response to Denise
24 Bensusan's Request for Review of the Certificate of Environmental Compatibility
25 ("CEC") granted unanimously by the Power Plant and Transmission Line Siting
26 Committee ("Committee"). The Applicant respectfully requests that the Commission
approve the CEC at its next regularly scheduled Open Meeting so that this innovative, job-
creating, renewable energy project can move forward without further delay.

Introduction

Ms. Bensusan claims that she had an absolute right to intervene in this proceeding
because she lives in Hualapai Valley and her well is in the same aquifer that wells from
the Project would use. As a legal matter, this position is incorrect. Pursuant to the statute
governing intervention in line-siting matters, the Committee has discretion on whether to
grant intervention to individuals such as Ms. Bensusan.

1 As a practical matter, Ms. Bensusan's position is untenable as well. Her well is one
2 of over 800 wells in this aquifer. See Table B-1 of Appendix B-1 to the Application. If
3 every well owner had the right to intervene, Arizona's siting process would become an
4 unmanageable bureaucratic morass. Any competitive advantage the State of Arizona
5 might have over other states to site renewable power plants would evaporate, as the federal
6 NEPA process and other states' siting processes would be models of efficiency and good
7 governance by comparison.

8 Perhaps recognizing the likely outcome that the Commission will conclude that the
9 Committee has the discretion to deny her intervention, Ms. Bensusan also asks the
10 Commission to find that all members of the Committee abused their discretion in this case.
11 This argument is also without merit. The Committee members' decision was thoughtful,
12 considerate, well-documented and reasonable. Furthermore, the Committee addressed all
13 of her material concerns during the course of the hearing even though she was not granted
14 intervention status.

15 Background

16 On November 23, 2009, the Applicant filed an application for a CEC authorizing
17 construction of the Hualapai Valley Solar Project, a 340 MW parabolic trough
18 concentrating solar thermal generating facility and an associated gen-tie line (power plant
19 and gen-tie collectively called the "Project"), located in Mohave County.

20 The Committee held a public hearing on January 12 and January 13, 2010, in
21 Kingman, Arizona. The Applicant called five witnesses and the Committee called six
22 more, including two individuals who had requested intervention (Ms. Bensusan and Ms.
23 Susan Bayer) and two officials (the City of Kingman Mayor and the Mohave County
24 Manager) specifically to address the concerns of Ms. Bensusan and Ms. Bayer. In
25 addition, thirty-seven individuals provided public comment, including three who were
26 listed as witnesses by Ms. Bensusan. At the conclusion of a detailed evidentiary hearing,

1 the Committee voted unanimously to grant a CEC for the Project. The Project as approved
2 by the Committee will be the first commercial-scale solar project in Mohave County, and
3 will likely be the first commercial-scale solar project in the country to use effluent for a
4 majority of its cooling purposes.

5 On January 21, 2010, the Applicant requested that the Committee reconsider the
6 question of whether to grant intervenor status to Ms. Bensusan and Ms. Bayer.¹ To
7 Applicant's knowledge, the proactive effort made by the Applicant to accommodate a
8 requested intervenor has no precedent in proceedings before the Committee.

9 In an open meeting held January 27, the Committee, by a unanimous 10-0 vote,
10 denied the request to reconsider the intervention requests of Ms. Bensusan and Ms. Bayer
11 after thorough and thoughtful consideration. Her Request for Review now asks the
12 Commission to overturn the Committee's unanimous decision to grant the Applicant a
13 CEC although Ms. Bensusan herself did not request that the Committee reconsider its
14 decision to deny her intervention.²

15 Discussion

16 I. Ms. Bensusan was not entitled to intervene as a matter of right.

17 In support of her argument that she was entitled to intervene, Ms. Bensusan argues
18 that a state court rule of procedure trumps an otherwise applicable state statute, simply
19 because she claims a direct and substantial interest in the proceeding.

20 Her arguments lack merit.

21 ¹ In its January 21, 2010, request, the Applicant also asked the Committee to ratify the
22 legal action made to grant the CEC, which the Committee subsequently did in an Open
23 Meeting held on February 11, 2010. Neither Ms. Bensusan in her request for review, nor
any other individual, has raised questions concerning the validity of the ratification
process.

24 ² Pursuant to A.R.S. § 40-360.07.A, Ms. Bensusan lacks standing to request review. The
25 appropriate avenue for her to seek relief would be to file for an amendment, pursuant to
26 A.R.S. § 40-252 once the CEC is granted by the Commission. While this might appear
cumbersome at first, it is the only lawful approach and the only way to accomplish Ms.
Bensusan's alternative requested relief to modify the CEC subject to the condition that the
matter be reopened.

1 A. **Pursuant to A.R.S. § 40-360.05, individuals do not have the right to**
2 **intervene.**

3 Section 40-360.05(A) is the controlling authority on whether intervention in
4 proceedings before the Committee is as a matter of right or discretionary. It states:

5 A. The parties to a certification proceeding shall include:

- 6 1. The applicant.
- 7 2. Each county and municipal government and state agency
8 interested in the proposed site that has filed with the chairman
9 of the committee, not less than ten days before the date set for
10 the hearing, a notice of intent to be a party.
- 11 3. Any domestic nonprofit corporation or association formed in
12 whole or in part to promote conservation or natural beauty, to
13 protect the environment, personal health or other biological
 values, to preserve historical sites, to promote consumer
 interests, to represent commercial and industrial groups, or to
 promote the orderly development of the areas in which the
 facilities are to be located, that has filed with the chairman of
 the committee, not less than ten days before the date set for the
 hearing, a notice of intent to be a party.
4. Such other persons as the committee or hearing officer may at
 any time deem appropriate.

14 Under the plain terms of this statute, county and municipal governments
15 (subsection A.2); state agencies (subsection A.2); and certain domestic nonprofits
16 (subsection A.3) have the right to intervene. Intervention by all others is at the
17 Committee's discretion, if the Committee deems it appropriate (subsection A.4).

18 Despite the plain terms of the statute, Ms. Bensusan argues that Rule 24(a) of the
19 Arizona Rules of Civil Procedure provides the right to intervene to anyone who claims an
20 interest relating to the application. During the Committee's deliberation of the request for
21 reconsideration, Committee Member Jessica Youle succinctly explained why that
22 argument was untenable:

23 I also am extremely troubled with the concept that every citizen should have,
24 has party status of right. It seems to me even from a statutory construction
25 perspective, that would totally negate the necessity to have a section like 40-
26 360.05. So you might as well be voiding this entire statute....I believe the
 statute is clear, that it is discretionary action by the Committee, and to have
 otherwise, as I say, would be repealing the statute. Reconsideration Tr. at
 29:23-30:8.

1 As the Committee properly held, it is black letter law that reviewing bodies must
2 give effect to the “unambiguously expressed intent” of the statute’s drafters. *See Chevron*
3 *v. NRDC*, 467 U.S. 837, 842-843 (1984). Here, the statute is clear. The Committee has
4 the discretion to grant or deny intervention for individuals such as Ms. Bensusan.

5 **B. Ms. Bensusan did not have a direct and substantial interest in the**
6 **proceeding.**

7 Additionally, even if Rule 24(a) applied, Ms. Bensusan’s claims that she has a
8 direct and substantial interest are not supported by her testimony or her statements to the
9 Committee. To the contrary, Ms. Bensusan’s interests are not direct and substantial.

10 She has just one of the over 800 wells that are within the aquifer at issue. *See* Table
11 B-1 of Appendix B-1 to the Application. Additionally, her unsupported statement that she
12 is one of the closest landowners to the Project is in fact contradicted by the record. Her
13 well, located in Township 24 N, Range 16 W, is two townships (roughly 12 miles)
14 removed from the Project, and there are dozens, if not hundreds of wells, located closer to
15 the Project than hers. *See* Figure 1 and Table B-1 of Appendix B-1 to the Application.

16 In her testimony, Ms. Bensusan noted, “we can learn from California.” Tr. at
17 456:6. This is one statement with which all can agree. Replicating California’s siting
18 process by allowing anyone claiming an interest to intervene is not in the interest of the
19 public, CEC applicants, the Committee, or the Commission.

20 **II. The Committee did not abuse its discretion when it denied intervention.**

21 Because Ms. Bensusan was not entitled to intervene, her only remaining argument
22 is that the Committee erred by not granting her permissive intervention. To prevail on this
23 argument, Ms. Bensusan must show that the Committee abused its discretion when it
24 denied her request. *See Harris v. State*, 198 Ariz. 444, 11 P.3d 403, 408 (App. 2000)
25 (“The standard of review for the denial of permissive intervention is abuse of discretion”).
26

1 Ms. Bensusan faces a high hurdle in attempting to argue that each Committee
2 member abused his or her discretion in denying intervention. Under Arizona law, to show
3 an abuse of discretion, Ms. Bensusan would have to show that the Committee's actions
4 were "manifestly unreasonable" or that the Committee's discretion was "exercised on
5 untenable grounds, or for untenable reasons." *Quigley v. City Court of the City of Tucson*,
6 132 Ariz. 35, 37 (App. 1992). Furthermore, it is not enough that the Commission might
7 have ruled differently if it had been faced with the same question initially. A reviewing
8 tribunal may not substitute its own judgment for that of the lower tribunal. *Id*; *see also*,
9 *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)
10 (describing abuse of discretion review as "limited and deferential").

11 In this case, the Committee provided clear, reasoned justifications for why
12 intervention was not granted and worked diligently to accommodate the testimony and
13 concerns of Ms. Bensusan.

14 **A. The Committee's decision was reasonable.**

15 During the Committee's consideration of the request to reconsider, the Committee
16 members fully explained their decision. For example, Committee Member Mike Palmer
17 explained:

18 This Committee and the evidentiary process was conceived and authorized
19 by the legislature almost 30 years ago, and the intent was to create a
20 mechanism by which conditions are imposed on the siting of power plants
21 and transmission lines that would mitigate environmental impact; and our
22 task was to gather as much information as possible to achieve that objective.
23 This Committee is comprised of five former legislators, five attorneys. It's a
24 distinguished body, certainly able to perform that task....

25 We have enough folks here on this panel, on this Committee to act as cross-
26 examiners on witnesses from the Applicant and from any other
27 intervenors....

28 So I chose not to second the motion because I didn't see an advantage that we
29 would gain.... [We] gave them the opportunity to testify and be on the
30 record. And I thought that was sufficient. Reconsideration Tr. at 27:11-
31 28:20.

1 Commission Chairman Designee David Eberhart stated:

2 My impression was that they [Ms. Bensusan and the other individual who
3 had requested intervention status] were allowed a significant amount of time
4 to present the information they had....
5 So I agree with you that I think that there was little more that could have
6 been added that would have been significant on the record. Reconsideration
7 Tr. at 35:14-22.

8 Similarly, Committee Member Barry Wong, who originally moved to grant intervention
9 status, stated:

10 I think there was a full vetting of the witnesses. I felt comfortable following
11 the denial of [my] intervention motion that there was a very detailed cross-
12 examination of all the witnesses....
13 So even though at the time I think it would have been fair to include them as
14 intervenors, I think now after the fact, I'm not sure how much more
15 information we can receive. Reconsideration Tr. at 23:17-33:3.

16 The Committee's discretion allows it to counterbalance the importance of citizen
17 participation with the need to efficiently manage its proceedings. *See California Trout v.*
18 *FERC*, 572 F.3d 1003, 1007 (9th Cir. 2009) (holding that FERC's denial of intervention
19 was not abuse of discretion) ("Agencies must have the ability to manage their own dockets
20 and set reasonable limitations on the processes by which interested persons can support or
21 contest proposed actions."); *see also Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989)
22 (Permissive intervention "necessarily vests discretion in the district court to determine the
23 fairest and most efficient method of handling a case." (internal quotation marks omitted)).

24 Under any fair reading of the record in this case, the Committee's action cannot be
25 characterized as "manifestly unreasonable" or "untenable." To the contrary, the
26 Committee's actions in this case were very reasonable and well within its authority.

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B. The Committee addressed all of Ms. Bensusan's concerns that were material and nonrepetitive.

Even though Ms. Bensusan was not granted intervention status, the Committee allowed her ample opportunity to provide sworn testimony and raise material, nonrepetitive concerns.³

As Committee Member Gregg Houtz explained, once Ms. Bensusan raised concerns during her testimony, "Committee members have had a history of listening to those questions and maybe re-asking them in a different form." Tr. at 17:12-13.

Similarly, Committee Member Wong informed Ms. Bensusan that she could:

present your information and evidence, written and verbal, and you can raise the issues to us, and then we have the option to then ask those questions or some form of them at our discretion to the parties, even though you don't have a right formally to cross-examine other witnesses. Tr. at 18:1-7.

That is exactly what the Committee did in this case. Ms. Bensusan's testimony lasted over one hour, longer than the testimony of the Applicant's environmental witnesses. The Committee carefully considered her concerns, asked follow up questions of the Applicant, and imposed conditions designed to address her concerns and the other individual who testified.

According to her request for review, Ms. Bensusan's primary concerns related to: (1) impacts to the Hualapai aquifer; (2) dry cooling; (3) Mohave County's approval process; (4) impacts on wildlife; and (5) flood control and drainage concerns.

To address concerns about impacts to the aquifer, the Committee imposed conditions 4 and 24 in the CEC, which read as follows:

³ One example of an immaterial argument is Ms. Bensusan's claim that nearby residents would file for compensation under Proposition 207 because granting the CEC would diminish the value of neighboring properties. See Committee Ex. BEN-1. As codified in statute, however, Proposition 207 exempts land use laws that "[e]stablish locations for utility facilities" or that "[d]o not directly regulate an owner's land." § 12-1134(B)(5), (6).

1 4. The Applicant shall make all reasonable efforts to minimize the use of
2 groundwater during construction and operation of the Project, and use
3 effluent for cooling and all other non-potable water uses to the extent
4 it is made available by the City of Kingman from its Hilltop Waste
5 Water Treatment Plant ("WWTP") and can be transported by the
6 Applicant and at the Applicant's expense to the Project site. The
7 Applicant may utilize groundwater for potable uses and as a back-up
8 to effluent when effluent is not available from the City of Kingman or
9 when transmission of the effluent is interrupted from the Hilltop
 WWTP to the Project. Total water use per year shall not exceed 3,000
 AF from all sources and shall not exceed 2,400 AF of groundwater for
 cooling purposes. The Applicant, within two years from the Arizona
 Corporation Commission ("Commission") approval of the Certificate,
 shall contract with the City of Kingman for sale, transmission and use
 of effluent generated by the Hilltop WWTP. If contracting is
 unsuccessful in this time frame, the Applicant may apply to the
 Commission for an extension of time to negotiate the contract.

10 24. The Applicant also shall file annual reports with Docket Control and
11 the Compliance Officer of the Commission, and with the Arizona
12 Department of Water Resources stating the total amount of water used
13 in the operation of the Project, including the amount of groundwater.
 Annual reports of water usage shall begin with commencement of
 commercial operation of the Project and continue for the life of the
 Project.

14 To address specific concerns raised about wildlife impacts, the Committee imposed
15 Condition 16:

16 16. All lighting shall be shielded, cantered or cut to ensure that light
17 reaches only areas needing illumination.

18 The Committee also fully vetted Ms. Bensusan's other concerns, asking questions about:

19 Dry cooling, *see, e.g.*:

- 20 • **Committee Member Gregg Houtz:** Mr. Campbell, when your
21 witness comes and discusses the dry cooling, I hope that there is also
 discussion of wet/dry hybrid cooling. Tr. at 34:2-4.
- 22 • **Member Houtz:**
23 Q: Mr. LaRow, you talk about the higher capital costs for dry
24 cooling and you said two to three times greater?
 A: Applicant Witness Mike LaRow: Yes. Tr. at 167:22-25
- 25 • **Committee Member William Mundell:** Could you quantify -- you
26 said there was a 7 to 9 percent penalty using dry cooling over wet
 cooling. Do you have some dollar figures to quantify that? Tr. at
 178:10-13.

1
2 • **Member Mundell:**

3 Q. And then you talked about dry cooling. I mean, isn't there a
4 gas dry cooling facility in southern Nevada?

5 A. Applicant Witness Greg Bartlett: Yeah. At Nevada Solar One,
6 if you know that CSP plant, nearby that is an El Dorado plant
7 that's a, I believe natural gas, combined cycle, runs 24 hours a
8 day, and it is dry cooled.

9 Q. Right. Because you talked about the Solar One. But as I said,
10 there's also a gas dry cooling facility, and that runs 24 hours a
11 day. So to Member Houtz's question, it's a base load plant
12 then? Tr. at 179:10-19.

13
14 Mohave County's approval process, *see, e.g.*:

15 • **Committee Member Wong:**

16 Q: Mr. Walker, you're the county manager; is that correct?

17 A: Committee Witness Ron Walker: That's correct, sir.

18 Q: You attended all of the public hearings relative to this project;
19 is that correct?

20 A: I attended all of the board of supervisors public hearings.

21 Q: At any time during those hearings was there an opportunity for
22 public input regarding water usage, and more specifically
23 groundwater usage?

24 A: Yes, sir. Tr. at 52:22-53:7.

25 • **Committee Member Mundell:**

26 Q: The county does have some -- quite a bit of impact on water
usage by the type of zoning they approve. Would you agree
with that statement?

A: Mr. Walker: I would agree, sir. Tr. at 58:25-59:3.

• **Member Mundell:**

Q: And then just to make sure I'm clear on your testimony, the
amount of water usage, based on your understanding, that the
plant will use will be less than what would have occurred if the
residential development had come to fruition?

A: Mr. Walker: It's our understanding if the residential
development went to its full potential buildout that the water
usage for that would be higher than what it's going to be
proposed for this plant. Tr. at 60:12-20.

Flood control and drainage, *see, e.g.*:

• **Committee Member Patricia Noland:**

Q: Mr. Chairman, Mr. LaRow, would you not have to apply for
and -- I believe it was mentioned by the county manager --
obtain permits that would deal with the floodplain?

A: Mike LaRow: Absolutely. Absolutely. Tr. at 176:23-177:2.

1 Accordingly, the Applicant respectfully requests that, at the next regularly
2 scheduled Open Meeting, the Commission review and approve the thoughtful, considered,
3 and fair decision made by the Committee to grant a CEC for this important Project.

4 Respectfully submitted this 10th day of March, 2010.

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7 

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13 of the foregoing filed this 10th day
14 of March, 2010, with:

15 The Arizona Corporation Commission
16 Utilities Division – Docket Control
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17 COPY of the foregoing hand-delivered
18 this 10th day of March, 2010, to:

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